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In The

Supreme Court of the United States

NICK FURFARO; BRANDY KIDDER; ESMERALDA SILVA; AND JJR, INC.,

Conditional Cross-Petitioners,

v.

CITY OF SEATTLE,

Conditional Cross-Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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CONDITIONAL CROSS-QUESTIONS PRESENTED

1. Whether the requirement, under First and Fourth Amendments, that a police officer obtain a constitutionally sufficient warrant before seizing books or films pursuant to an anti-obscenity statute, also applies to arrests of live dancers and individual promoters for violating the same kind of statutes.

2. Whether the Fourth Amendment rule that ordinarily permits arrests to be validated by post-arrest determinations of probable cause applies to arrests of individuals involved in presumptively protected expression.

STATEMENT PURSUANT TO RULE 29.6

JJR, Inc. has no corporate parent. Nor does any publicly held company own ten percent or more of JJR's stock.

TABLE OF CONTENTS

Page

CONDITIONAL CROSS-QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6..... ii

TABLE OF AUTHORITIES v

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTIONAL STATEMENT..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE..... 4

A. Background 4

B. Procedural History 6

REASONS FOR GRANTING THE CONDITIONAL CROSS-WRIT..... 9

I. This Court Should Resolve the Issue Whether Police Officers Must Obtain Warrants Before Arresting Live Entertainers or Individual Promoters for Violations of an Anti-Obscenity Ordinance 11

A. State and Federal Courts Are Divided Regarding Whether Police Officers Must Obtain Warrants Before Arresting Live Entertainers or Promoters for Violations of an Anti-Obscenity Ordinance 13

TABLE OF CONTENTS – Continued

Page

B. The Washington Supreme Court's Holding that Constitutional Protections Against Prior Restraints Do Not Apply to Live Entertainment with Exclusively "Nonverbal Elements" is Incorrect and Has Grave Implications for the Law of Free Expression 16

II. This Court Should Decide Whether Police Officers May Arrest Individuals For Violating Anti-Obscenity Statutes Without First Actually Concluding that the Expression at Issue Is, in Fact, Obscene 22

III. This Case Is an Excellent Vehicle for Considering the Two Questions Presented..... 25

A. The Facts of this Case Squarely and Cleanly Present the Questions Presented 25

B. This Court Possesses Jurisdiction Over the Washington Supreme Court's Rulings Involved in this Conditional Cross-Petition .. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 11

Admiral Theatre v. City of Chicago, 832 F. Supp. 1195 (N.D. Ill. 1993) 14

Alexander v. United States, 509 U.S. 544 (1993) 23

Bantam Books v. Sullivan, 372 U.S. 58 (1963) 12, 17

City of Chicago v. Festival Theatre Corp., 410 N.E.2d 341 (Ill. App. 1980), *aff'd on other grounds*, 438 N.E.2d 295 (Ill. 1982) 15

City of Chicago v. Hanson, 435 N.E.2d 120 (Ill. App. 1982) 15, 24

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 10, 19

Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998) 19

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 1, 27, 28

Dima Corp. v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999) 19

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).....12, 20

Elam v. Bolling, 53 F. Supp. 2d 854 (W.D. Va. 1999) 20

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 11, 23, 28, 29

Freedman v. Maryland, 380 U.S. 51 (1965) 24

In re Giannini, 446 P.2d 535 (Cal. 1968)..... 20

Heller v. New York, 413 U.S. 483 (1973) 11, 14

TABLE OF AUTHORITIES – Continued

Page

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557 (1995) 20

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 16

Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986) 19

Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976) 14

Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968) 11

Marcus v. Property Search Warrant, 367 U.S. 717 (1961) ..... *passim*

Maryland v. Macon, 472 U.S. 463 (1985) 12, 24

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 28

Miller v. California, 413 U.S. 15 (1973) 19

Monroe v. State Court, 739 F.2d 568 (11th Cir. 1984) 21

National Socialist Party v. Skokie, 432 U.S. 43 (1978) 28

New York v. P.J. Video, Inc., 475 U.S. 868 (1986) 11

Payton v. New York, 445 U.S. 573 (1980) 12, 21

Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 14

People v. Adais, 114 Misc. 2d 773, 452 N.Y.S.2d 453 (N.Y.C. Crim. Ct. 1982) 15

People v. Morgan, 86 Misc. 2d 377, 382 N.Y.S.2d 666 (N.Y.C. Crim. Ct. 1976) 15, 24

Roaden v. Kentucky, 413 U.S. 496 (1973) ..... *passim*

SOB, Inc. v. County of Benton, 171 F. Supp. 2d 978 (D. Minn. 2001) 14

TABLE OF AUTHORITIES – Continued

Page

Scott v. United States, 436 U.S. 128 (1978) 22

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 12, 16, 19, 21, 24

State v. Furuyama, 637 P.2d 1095 (Haw. 1981) 14

Steagald v. United States, 451 U.S. 204 (1981) 12, 21

Texas v. Johnson, 491 U.S. 397 (1989) 21

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 21

Whren v. United States, 517 U.S. 806 (1996) 22

STATUTES AND RULES

42 U.S.C. § 1983 ..... 6, 7, 8, 26, 27

28 U.S.C. § 1257(a) 1

Seattle Municipal Code (SMC) § 6.270.100 ..... *passim*

Wash. Const. Art. I, § 5 29

Wash. R. App. Proc. 4.2(a)(4) 7

Wash. R. App. Proc. 4.2(e) 7

Wash. R. App. Proc. 12.5(a) 29

Wash. R. App. Proc. 13.7(b) 8

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Nick Furfaro, Brandy Kidder, Esmeralda Silva, and JJR, Inc. ("Cross-Petitioners") conditionally cross-petition for a writ of certiorari to the Washington Supreme Court in *Furfaro v. City of Seattle*, No. 68691-7 (as amended on Dec. 5, 2001).

OPINIONS BELOW

The amended decision of the Washington Supreme Court, which is reproduced in the Appendix to the City of Seattle's Petition for Certiorari in No. 01-1316 ("Pet. App.") 1-27 and Pet. App. 46-48, is reported at 27 P.3d 1160 (Wash. 2001), and 36 P.3d 1005 (Wash. 2001). The Washington Court of Appeals' decision, which is reproduced at Pet. App. 28-45, is reported at 984 P.2d 1055 (Wash. App. 1999). The trial court's decisions in this case are unreported.

JURISDICTIONAL STATEMENT

The Washington Supreme Court entered an amended opinion in this matter on December 5, 2001. Pet. App. 46-68. That amended opinion finally determined some federal issues in this case and remanded other federal and state issues to the Washington Court of Appeals, where this case is currently pending. The Washington Supreme Court recalled its mandate in this matter on January 7, 2002, Appendix to Brief in Opposition ("Opp. App.") 27, and has not re-issued it, thereby indicating that its December 5 amended decision is interlocutory in nature.

Jurisdiction in this Court is invoked under 28 U.S.C. § 1257(a), as that provision is elucidated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and its progeny. The basis for this Court's jurisdiction is further discussed *supra* in section III.B.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution in part provides:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1 of the Fourteenth Amendment to the United States Constitution in part provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Title 42 United States Code § 1983 in part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Seattle Municipal Code (SMC) 6.270.100 provides in part:

> A(2) No employee or entertainer shall perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, or any sexual acts prohibited by law;

b. The touching, caressing or fondling of the breasts, buttocks, or genitals; or;

c. The displaying of the pubic region, anus, vulva, or genitals; except as provided for in subdivision 1 of this subsection.

C. This chapter shall not be construed to prohibit expression, such as:

1. Plays, operas, musicals, or other dramatic works that are not obscene.

2. Classes, seminars, and lectures held for serious scientific or educational purposes that are not obscene; or

3. Exhibitions performances, expressions or dances that are not obscene.

D. For purposes of this chapter, an activity is "obscene" if:

1. Taken as a whole by an average person applying contemporary community standards the activity appeals to a prurient interest in sex;

2. The activity depicts patently offensive representations, as measured against community standards, of:

a. Ultimate sexual acts, normal or perverted, actual or simulated, or

b. Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area, or violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

3. The activity, taken as a whole lacks serious literary, artistic, political, or scientific value.

STATEMENT OF THE CASE

A. Background

Rick's is a non-alcoholic nightclub in Seattle that features nude dancing by female entertainers. Individual dancers perform strip tease routines in rotation on a stage accompanied by pre-recorded music. Each dance lasts two to three minutes, the length of a song.

On November 20, 1995, Seattle Police Detective Ken Swanson entered Rick's in an undercover capacity. As part of a pre-planned vice unit operation, Detective Swanson was investigating whether dancers were violating Seattle Municipal Code (SMC) 6.270.100(A)(2), by touching themselves on the breasts, buttocks, genitals or anus, or engaging in simulated masturbation, while performing on stage. Detective Swanson sat in front of the main stage and, using a hidden tape recorder, recorded his observations of each of the dancers as they performed in succession on stage. Detective Swanson would turn on the tape recorder and make a verbal notation when he saw dancers touch or "massage" themselves in their private areas. However, he made no effort to observe the entire performances, nor to determine whether they were obscene.

After recording his observations, Detective Swanson left the business and met with other vice unit officers at a pre-arranged location. A group of officers then entered Rick's and arrested thirteen dancers and the manager based on Detective Swanson's observations. When the officers entered the business, the lights were turned on and the customers were invited to leave. The dancers who were arrested were required to change clothes, hand over their costumes as evidence, and were taken to jail. The business was closed for approximately an hour and twenty minutes while the arrests were being made.

It was uncontested at trial that all acts leading to the arrests occurred while the individual dancers were performing dances. Opp. App. 20. In his testimony, Detective Swanson described the dancing of Darcy Poole, one of the

entertainers arrested in the raid. He testified that Poole was dancing and moving "in sync" with the music. She did not stop dancing to touch herself in private areas, but rather the "touching" was interspersed throughout the entire performance. The touching lasted two to three seconds. Opp. App. 16. Poole removed her costume slowly as part of a strip tease routine. Detective Swanson testified that all the performances that he observed that day were similar to that of Poole. Opp. App. 17. All the entertainers appeared to be dancing, and the touching was part of their dance.

In making their determination of probable cause, the arresting officers were exclusively concerned with whether dancers touched themselves on prohibited body parts. They paid no attention to the performances as a whole and did not consider obscenity. Captain Dan Oliver, the commanding officer of the operation, testified that if a dancer was touching herself on her breast she would be arrested, "even if she was doing a ballet." Opp. App. 23.

Chief of Police Norm Stamper testified that the Seattle Police Department has a policy of using a variety of methods and techniques to attempt to influence the behavior within the adult entertainment industry. One of these techniques includes making warrantless physical arrests when officers had probable cause to believe that entertainers had touched themselves in the private areas while dancing on stage. During intra-departmental discussions that preceded the arrests in this case, Chief Stamper and others determined that, in implementing this policy, officers would not consider the issue of obscenity in determining whether to arrest individuals for violations of SMC 6.270.100. When Chief Stamper learned of the arrests at Rick's, he gave his approval to what had occurred as following the dictates of department policy.

All of the dancers who were arrested were charged in the Seattle Municipal Court with violating SMC 6.270.100. One of the dancers went to trial and was acquitted. The

charges against the remaining dancers were dismissed. Pet. App. 29.

B. Procedural History

Upon termination of criminal proceedings, Cross-Petitioners filed this civil action in state court. Cross-Petitioners sought injunctive and declaratory relief and damages pursuant to 42 U.S.C. § 1983 based upon violation of their rights under the First, Fourth and Fourteenth Amendments. Cross-Petitioners maintained that the arrests and temporary closure of the business violated their First and Fourth Amendment rights because the police lacked a warrant for making the arrests, the officers failed to consider obscenity in their determination of probable cause, and probable cause was lacking here. They also sought injunctive and declaratory relief based upon violation of their rights under the freedom of expression and privacy provisions of the Washington Constitution.

Prior to trial, the trial court granted partial summary judgment to the City, ruling that the police were not required to obtain a warrant and that the individual officers named as defendants in the lawsuit were immune. The matter then proceeded to trial on the issue of probable cause and damages. The trial court reserved ruling on the claims for injunctive and declaratory relief under the State Constitution until after trial. In the course of its deliberations, the jury sent out a written question asking whether the officers were required to consider obscenity in making their determination of probable cause. Over the Cross-Petitioners' objection, the trial court instructed the jury that the officers were required to consider obscenity in making an arrest for expression but not if they were making an arrest for conduct. The jury proceeded to return a verdict for the City. Following the verdict, the trial court dismissed all of Cross-Petitioners' remaining claims.

Cross-Petitioners appealed the judgment directly to the Washington Supreme Court, which transferred the

case to the Court of Appeals.[1] In their brief, Cross-Petitioners argued that the arrests were unlawful under both the federal and state constitutions. The Court of Appeals unanimously reversed the judgment on solely federal grounds, holding that the police violated the First and Fourth Amendments when they arrested Cross-Petitioners for their stage performances, without first obtaining a warrant based on a judicial determination of obscenity. Pet. App. 28-45. The Court of Appeals ordered the case remanded to the trial court for a determination of damages under § 1983, as well as a reconsideration of the availability of injunctive and declaratory relief under the federal and state constitutions. Pet. App. 45.

Before that remand could be carried out, the City petitioned for review of the Court of Appeals' decision in the Washington Supreme Court, and the request for review was granted. A majority of the Washington Supreme Court affirmed the judgment of the Court of Appeals but on different grounds. Pet. App. 1-27. The Court held that a warrant was not required under the First and Fourth Amendments and that Cross-Petitioners' state constitutional claims did not give rise to a cause of action under Title 42 U.S.C. § 1983. However, the Washington Supreme Court held that the police were required to consider obscenity in their determination of probable cause and, therefore, that the jury was erroneously instructed that obscenity need not be considered. The majority remanded the case for a trial on the question of whether there was probable cause to believe that the

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[1] Under Wash. R. App. Proc. 4.2(a)(4), a party may seek direct review of a trial court decision by the Washington Supreme Court if the case involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." After the appeal is filed directly in the Washington Supreme Court, the Court may decide that grounds for direct review do not exist, in which case the matter is transferred to the Court of Appeals. *See* Wash. R. App. Proc. 4.2(e).

dancing was obscene and for a calculation of damages under § 1983. Justice Sanders concurred "only with the majority's result for the reasons so well articulated by Judge Becker on behalf of the Court of Appeals." Pet. App. 25-26.

Cross-Petitioners filed a timely motion for reconsideration in the Washington Supreme Court. In the motion, Cross-Petitioners argued the Court incorrectly stated in its opinion that the only issue raised on appeal was Cross-Petitioners' claim for damages under § 1983 and the Court improperly failed to address their claim for injunctive and declaratory relief under the state constitution. Cross-Petitioners asked the Court, pursuant to state rules of appellate procedure, either to consider the merits of their state constitutional claims or remand them for determination by the Court of Appeals.[2] The Washington Supreme Court granted reconsideration and changed its opinion. In the order granting reconsideration, the Court deleted the language from its opinion which precluded Cross-Petitioners from seeking injunctive and declaratory relief under the federal and state constitutions and it remanded the case to the Court of Appeals, "to consider the availability of injunctive and declaratory relief under the state constitution and issues left unresolved by this opinion." Pet. App. 47. The case is currently pending in the Washington Court of Appeals, which has issued a supplemental briefing schedule with respect to Cross-Petitioners' state constitutional claims. Briefing is due to be completed in late May of 2002. Opp. App. 25-27.

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[2] Wash. R. App. Proc. 13.7(b) in pertinent part provides, "If the Supreme Court reverses a decision of the Court of Appeals that did not consider all the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues."

REASONS FOR GRANTING THE CONDITIONAL CROSS-WRIT

Conditional Cross-Petitioners ("Cross-Petitioners") have filed (concurrently with this brief) an opposition to the City's petition for a writ of certiorari, which maintains that this Court lacks jurisdiction over the City's petition because there is not yet a "final judgment" (or any acceptable substitute for such a judgment) from the Washington State courts regarding either of the questions that the City presents. Cross-Petitioners believe that the proper course here is for the parties further to litigate this case in the Washington Court of Appeals (and then, if necessary, again in the Washington Supreme Court) before presenting any questions before this Court. Our brief in opposition also contends that, in any event, this Court should deny the City's petition because the questions it presents are not worthy of this Court's review.

If this Court, however, decides to review the City's petition, Cross-Petitioners respectfully urge this Court to grant this Conditional Cross-Petition for a Writ of Certiorari as well. Consideration of the two questions it presents is essential for a complete review of the federal constitutional claims and police practices at issue in this case. As even the City acknowledges, the central subject of this case is what procedures police officers must follow before arresting individuals for alleged violations of the misdemeanor offense codified at SMC 6.270.100. *See* Pet. 23 ("[T]he States need an answer from this Court as to how lawful arrests under such statutes can be made.") This matter of "how lawful arrests under such statutes can be made," *id.*, presents issues not only regarding whether (i) probable cause must exist to believe that arrested individuals are engaged in unprotected, obscene conduct in contravention of the statute, but also whether police officers must (ii) obtain, before making any arrest, a constitutionally sufficient warrant on the basis that the expression at issue is obscene or (iii) at least themselves make an actual pre-arrest determination on that basis.

Each of these three issues is inextricably intertwined with the others. Yet the two questions in the City's petition for certiorari presents only the first of these three issues.

The City, for example, asserts in its petition that requiring police officers to consider whether they are witnessing obscene conduct before arresting individuals pursuant to SMC 6.270.100 would place "obvious and significant . . . burdens" on officers. Pet. 23. To the extent that this is so, the natural way to relieve this burden is to hold that neutral magistrates, rather than police officers, must undertake this threshold obscenity consideration and issue arrest warrants only upon a finding that the entertainment at issue is unprotected expression. At the very least, this Court should make clear whether police officers must actually conclude that the expression at issue is obscene before making an arrest or whether they may ignore that issue on the hopes that their arrests will be validated by facts established in *post hoc* judicial proceedings.

Similarly, the City asserts that the First Amendment does not "automatically" extend to all activities that may take place inside an adult entertainment establishment. Pet. 15, 20-21. Cross-Petitioners do not contest this proposition. But since at least some (if not all) *stage dancing* in such establishments is unquestionably entitled to First Amendment protection, *see, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), it is necessary for someone to determine whether the activity at issue is protected expression or unprotected conduct. The critical question is who should make that determination: a police officer or a neutral judicial officer. This Court should not consider that question without granting this conditional cross-petition.

What is more, as the foregoing analysis explains, review of the warrant issue presented here – in contrast to the issues that the City presents – would resolve a legal disagreement in the lower courts and prevent the Washington Supreme Court's new and unsubstantiated rule

that the First Amendment affords less protection to non-verbal live entertainment than to verbal entertainment from infecting the fabric of free expression jurisprudence. Review of the *post hoc* determination issue similarly would clarify the scope of an important Fourth Amendment rule and explain how it meshes with the longstanding First Amendment right to be free from prior restraints in the absence of at least some kind of initial determination that the expression at issue is not constitutionally protected.

I. THIS COURT SHOULD RESOLVE THE ISSUE WHETHER POLICE OFFICERS MUST OBTAIN WARRANTS BEFORE ARRESTING LIVE ENTERTAINERS OR INDIVIDUAL PROMOTERS FOR VIOLATIONS OF AN ANTI-OBSCENITY ORDINANCE.

In a series of cases beginning with *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961), and *Roaden v. Kentucky*, 413 U.S. 496 (1973), this Court has held that before seizing books or films pursuant to a statute that prohibits obscene expression, the First and Fourth Amendments require police officers to obtain a "constitutionally sufficient warrant" – that is, a warrant from a neutral, detached judicial officer finding that the expression at issue is obscene. *See also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (warrantless seizure of books and films unconstitutional); *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986) (upholding seizure of film because officers obtained sufficient warrant); *Heller v. New York*, 413 U.S. 483 (1973) (upholding seizure of film and arrests of promoters because the officers obtained a warrant from a neutral magistrate); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968) (per curiam) (seizure of film unconstitutional because magistrate failed to make independent determination of obscenity); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964). The reason for this rule is that "constitutionally protected expression . . . is often separated from obscenity by a dim and uncertain line,"

Bantam Books v. Sullivan, 372 U.S. 58, 66 (1963), and the risk of "prior restraint of the right of free expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness." *Roaden*, 413 U.S. at 504.

This Court has held that live entertainment is entitled to the same level of First Amendment protection against prior restraints as are books and films. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975). It likewise is well settled that individuals are entitled to at least as much Fourth Amendment protection against warrantless and otherwise unreasonable seizures as are inanimate objects. *See, e.g., Steagald v. United States*, 451 U.S. 204, 213 (1981); *Payton v. New York*, 445 U.S. 573 (1980). But this Court has never squarely addressed the issue whether the warrant requirement enunciated in *Marcus* and *Roaden* applies to arrests of live entertainers or individual promoters of allegedly obscene material. In fact, in *Maryland v. Macon*, 472 U.S. 463 (1985), this Court expressly reserved "the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials." *Id.* at 471.

The failure of this Court to declare whether the warrant requirement that applies to seizures of books and films also applies to seizures of live entertainers and promoters has resulted in a patchwork of contradictory rulings in our Nation's most populous areas. It is critical for this Court to address this issue and to hold that, just as in the context of seizing books or films, police officers must obtain a constitutionally sufficient warrant before arresting any live performer or promoter for violating an anti-obscenity ordinance. Indeed, if anything, individuals should be entitled to more protection under the First and Fourth Amendments, for arresting individuals – unlike seizing books or films – entails a deprivation of personal liberty and also may terminate a constitutionally protected exhibition that can never again be duplicated.

A. State and Federal Courts Are Divided Regarding Whether Police Officers Must Obtain Warrants Before Arresting Live Entertainers or Promoters for Violations of an Anti-Obscenity Ordinance.

Courts in the United States' most populous regions persistently have disagreed over whether the First and Fourth Amendments' requirement that police officers obtain constitutionally sufficient warrants before seizing books or films for potential violations of anti-obscenity statutes also applies to arrests of live entertainers and promoters for violations of the same kinds of statutes. The trial court in this case held that no warrant is necessary when officers arrest such individuals in adult entertainment establishments. The Washington Court of Appeals, however, reversed this decision and unanimously held that "[w]e cannot dispense with the warrant requirement for live performances. . . . The controversial content of human expressive activity does not have to be captured in a film canister or within the covers of a book to make it worthy of protection." Pet. App. 41-42. The Washington Supreme Court divided on the issue. The majority sided with the trial court, holding that the First and Fourth Amendments' warrant requirement did not apply to "nonverbal nude dancing of the sort found in adult entertainment establishments." Pet. App. 11. Justice Sanders disagreed, stating that "[t]he majority's claimed distinction between the admitted necessity of a warrant to seize a videotape and the supposed propriety of a warrantless arrest of a performer in midperformance defies common sense. . . . The principle is the same in either case." Pet. App. 26.

Not only have judges in the State of Washington sharply disagreed concerning the applicability of the warrant requirement to live performances and promoters, but federal and state courts in other jurisdictions (and often within the same jurisdiction) also have reached conflicting results on this issue – with six of these nine decisions

holding that warrants *are* required for such arrests. In *Admiral Theatre v. City of Chicago*, 832 F. Supp. 1195 (N.D. Ill. 1993), police officers, just as in the instant case, "arrested all of the dancers present at [a nightclub's] premises based on the officers' belief that the dancers' expressive conduct was obscene and not protected by the Constitution." *Id.* at 1204. The Northern District of Illinois (which covers Chicago) declined to distinguish between expressive objects and live entertainment and held that the dancers' claim that their midperformance arrests "based on a *nonjudicial* determination that the *content* of their expression was constitutionally unprotected obscenity" alleged a violation of the First and Fourth Amendments. *Id.* (first emphasis added). Another federal court recently entered an injunction against the same types of warrantless arrests of nude dancers. *SOB, Inc. v. County of Benton*, 171 F. Supp. 2d 978, 984 (D. Minn. 2001). The United States Court of Appeals for the Fifth Circuit and the Hawaii Supreme Court have similarly held that police officers must obtain warrants before arresting any "promoter" or purveyor of allegedly obscene material. *See Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1361-62 (5th Cir. 1980) (arrests of individuals must "comport with the minimum constitutional requirements enumerated in *Heller* and *Roaden*"); *State v. Furuyama*, 637 P.2d 1095, 1100-01 (Haw. 1981) ("[A] police officer may not effect a warrantless arrest in a setting where first amendment freedoms are implicated.").

The Northern District of Texas, on the other hand, has held that warrantless arrests of nude dancers – at least so long as they occur during moments in which the dancers are actually performing – do not violate the First and Fourth Amendments. The court held that "[t]hough technically correct" that such arrests operate as prior restraints, warrantless arrests are lawful because "the performer may post bail and resume her 'expression' as quickly as logistics permit." *Kew v. Senter*, 416 F. Supp. 1101, 1105-06 (N.D. Tex. 1976).

Compounding the confusion on this issue, two state courts that cover Chicago and New York City – the Illinois Court of Appeals and the New York Criminal Court – each have issued two contradictory rulings on the constitutionality of warrantless arrests of individual dancers. *Compare City of Chicago v. Festival Theatre Corp.*, 410 N.E.2d 341, 353-55 (Ill. App. 1980) (live adult entertainment that includes simulated sex acts is entitled to at least as much protection against prior restraints as are books and films), *aff'd on other grounds*, 438 N.E.2d 295 (Ill. 1982), *with City of Chicago v. Hanson*, 435 N.E.2d 120, 124-25 (Ill. App. 1982) ("mere arrest and prosecution of [dancers] charged with obscenity [does] not necessitate a prior judicial determination of obscenity" because live performances are different than "celluloid and other written materials") *and People v. Adais*, 114 Misc. 2d 773, 452 N.Y.S.2d 453 (N.Y.C. Crim. Ct. 1982) (holding that First and Fourth Amendments prohibit warrantless arrests of dancers in an adult nightclub because "[i]t is almost preposterous to believe that systems of censorship prohibited by our Constitution as to book publishers and film producers ought not be prohibited as to our dancers. . . . ") *with People v. Morgan*, 86 Misc. 2d 377, 382, 382 N.Y.S.2d 666 (N.Y.C. Crim. Ct. 1976) (holding that no pre-arrest judicial determination regarding obscenity is required because nude dancing "differs completely from the constancy of the printed word, the celluloid film, or even the live performance which proceeds pursuant to a predetermined format or script"). The law on this important issue is thus utterly unclear in two of America's three largest cities.

A decision from this Court on the scope of the warrant requirement in the anti-obscenity context is necessary to guide the actions of police officers, as well as promoters, entertainment companies, dancers, and other live performers throughout this country and to restore coherence to the scope of the First and Fourth Amendments' protections against prior restraints of free expression.

B. The Washington Supreme Court's Holding that Constitutional Protections Against Prior Restraints Do Not Apply to Live Entertainment with Exclusively "Nonverbal Elements" is Incorrect and Has Grave Implications for the Law of Free Expression.

In considering whether the *Marcus/Roaden* warrant requirement applies to arrests of live dancers and promoters, the Washington Supreme Court acknowledged that this Court held in *Southeastern Promotions* (a case involving the musical "Hair") that live entertainment is entitled to the same level of First Amendment protection against prior restraints as is other types of expression, such as books and films. Pet. App. 10 (citing *Southeastern Promotions*, 420 U.S. at 557-58).[3] But the Washington Supreme Court refused to deduce from *Southeastern Promotions* that the warrant requirement that applies to books and films must also apply to this case. The majority of that Court reasoned that "*Southeastern* appears to deal with a category of expression which excludes the kind of nude dancing at issue here" because this type of nude dancing lacks "verbal elements" and, thus, receives "less protection under the First Amendment than do books and film." Pet. App. 7, 11. In short, under the Washington Supreme Court's holding, the First and Fourth Amendments require police officers to obtain warrants before arresting nude dancers for obscenity violations if the dancing at issue is accompanied by "verbal elements," but not if it

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[3] In *Southeastern Promotions*, while addressing what First Amendment standard applies to live entertainment, this Court gave the same answer as it did when it first confronted films: " '[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.' " 420 U.S. at 557 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

involves only "nonverbal" expression "of the sort found in adult entertainment establishments." Pet. App. 11.

This holding is in serious tension with this Court's free-expression jurisprudence and contravenes basic First and Fourth Amendment principles. There is nothing in this Court's *Marcus/Roaden* line of cases suggesting that the warrant requirement that applies to books and films should not apply to live performers and promoters. The warrant requirement elucidated in *Marcus* and *Roaden* is grounded in the need for governmental regulation of obscenity to follow "procedures that will ensure against curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line." *Bantam Books*, 372 U.S. at 66. A "searching" judicial inquiry by a neutral judicial officer concerning whether the expression at issue is, in fact, obscene thus reduces the possibility that a police officer will erroneously restrain free expression based on his own "conclusory opinion" that the expression is obscene. *Roaden*, 413 U.S. at 502-06; *Marcus*, 367 U.S. at 731-32.[4] Warrantless seizures in such situations are also unnecessary to preserve evidence of a crime. *See Roaden*, 413 U.S. at 505.

These considerations apply with equal, if not greater, force in the context of arrests of individuals suspected of performing or promoting obscene expression. As this

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[4] The concern that police officers will improperly censor free expression is not meant to suggest that officers will necessarily act in bad faith. To the contrary, as this Court has explained, "[i]t is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected." *Marcus*, 367 U.S. at 732. The City, indeed, acknowledges here that requiring its officers "to consider whether [they] are witnessing obscenity" imposes "obvious and significant . . . burdens on law enforcement." Pet. 23.

Court observed *Marcus*, "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." 367 U.S. at 729. This history of abuse to which the Framers were reacting included warrantless arrests of individuals, not just warrantless seizures of books, *see id.* at 728 – and modern "expression," of course, still takes the form of live entertainment as well as written text.

It is no easier to determine whether live entertainment is obscene than it is to decide whether printed material or a film is obscene. And arresting dancers and an individual promoter of allegedly obscene live expression can squelch that expression just as readily as seizing a film and arresting the theatre's manager and projectionist (the action that occurred in *Roaden*, 413 U.S. at 497-98) can. It is, therefore, equally critical in the context of live entertainment that a police officer present a recording or a description of the expression at issue to a neutral judicial officer before making any seizures based on anti-obscenity ordinances. Indeed, if anything, the need for a judicial determination of obscenity is more important in the context of arresting individuals because personal liberty is at stake and because seizing people instead of mere objects can shut down an entire expressive venue. *See Roaden*, 413 U.S. at 504 (expressing particular concern regarding seizures that bring "to an abrupt halt an orderly and presumptively legitimate . . . exhibition").

The Washington Supreme Court's protestation that nude dancing of the sort found in adult entertainment establishments "receives less protection under the First Amendment than do books and film," Pet. App 7, 11, is based on a false comparison and ignores the reality that the expression at issue in *Marcus* and *Roaden* was also sexually explicit and also took place in adult establishments. The proper comparison in this case is not between nude dancing and books and films generally, but rather between dancing generally and books or films generally –

or, perhaps even more appropriately, between nude dancing and sexually explicit books and film. When that correction is made, it becomes clear that while nude dancing may fall "only within the outer ambit of the First Amendment protection," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284 (2000), books and films sold in adult bookstores and theatres that depict sexually explicit pornography reside no closer to core First Amendment values. *Miller v. California*, 413 U.S. 15 (1973) (sexually explicit material); *see also Dima Corp. v. Town of Hallie*, 185 F.3d 823, 827 (7th Cir. 1999) ("sexually explicit, non-obscene" books receive same level of protection as nude dancing). To the extent that certain dancing – or a certain book or film – is so sexually explicit (yet non-obscene) that it might somehow be entitled to less than full First Amendment protection, the uncertainty inherent in that sort of classification underscores the need for a pre-arrest judicial inquiry into exactly what type of expression is at issue.[5]

It is no answer to attempt to distinguish – as the Washington Supreme Court did – between the nude dancing involved in *Southeastern Promotions* and the nude dancing involved here on the basis of whether the dancing contains "verbal elements." Pet. App. 11. Although this Court has never expressly ruled that expression with

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[5] Assuming that a category of expression can be defined with sufficient precision as involving sexually explicit, non-obscene speech, the federal circuits – as well as leading constitutional commentators – are split over whether this category of expression would be entitled to less than full First Amendment protection. *Compare, e.g., Dima Corp.*, 185 F.3d at 827 (reduced protection) *with Colacurcio v. City of Kent*, 163 F.3d 545, 550 (9th Cir. 1998), *and Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986) (full protection and discussing scholarly confusion over issue). The only relevant point for this case, however, is that all courts agree that sexually explicit, non-obscene books and films are entitled to the same level of First Amendment protection (whatever that level may be) as is sexually explicit, non-obscene live entertainment.

solely nonverbal elements is entitled to the same level of First Amendment protection as that with verbal elements, this Court consistently has treated the two types of expression the same way. This Court held, for instance, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), that parades are form of expression and that "[t]he protection that inheres in a parade *is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression.*" *Id.* at 569 (emphasis added). This Court further explained that a particularized message is "not a condition of constitutional protection," for otherwise the First Amendment "would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Id.* The first two of these mediums, of course, lack any verbal component.

Closer to home for purposes of this case, while the Washington Supreme Court's opinion seems to condone the Seattle police department's policy of making warrantless arrests of any ballet dancer who touches her buttocks or breasts, *see* Opp. App. 23, this Court has stated that a performance of "Ballet Africains" (an overtly erotic nude dance without any verbal component) is of "unquestionable artistic and socially redeeming significance" without ever suggesting that its lack of verbiage reduces its level of First Amendment protection. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975). Other courts also have recognized that expressive performances of pantomime, Western ballet, and the lambada are entitled to just as much protection as comparable verbal counterparts. *See Elam v. Bolling*, 53 F. Supp. 2d 854, 859-60, 863 (W.D. Va. 1999); *In re Giannini*, 446 P.2d 535, 538-40 (Cal. 1968). In short, no court other than the Washington Supreme Court has ever distinguished between two kinds of dance based upon the presence or absence of verbal elements. Rather, the uniform rule until this decision was that "it is . . . not simply the verbal or nonverbal nature of the expression,

but the governmental interest at stake, that helps determine whether a restriction on that expression is valid." *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *see also Monroe v. State Court*, 739 F.2d 568, 574 (11th Cir. 1984) ("[D]irect governmental regulation of nonverbal expression should be subject to the same limitations under the first amendment as direct regulation of verbal expression."). Permitting a ruling to stand that apparently would now distinguish not only between equivalent types of dancing, but also, for example, between classical music or jazz on the one hand and verbal pop music on the other has grave implications for the law of free expression. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of communication and expression, is protected under the First Amendment.").[6]

Finally, the Washington Supreme Court's analysis of this issue completely overlooks the fact that the *Marcus/Roaden* warrant requirement is based not only on First Amendment protections, but also on the "reasonableness" mandate of the Fourth Amendment. *See Roaden*, 413 U.S. at 501-02. This Court has expressly held that the Fourth Amendment provides individuals at least as much procedural protection against warrantless arrests as it provides to warrantless seizures of inanimate objects. *See, e.g., Steagald*, 451 U.S. at 213; *Payton*, 445 U.S. at 585-90.

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[6] The illogicality of the Washington Supreme Court's verbal/nonverbal distinction is also apparent when one considers its consequences inside of adult entertainment establishments. The Court's acknowledgement that police officers must obtain warrants when nude dancing is accompanied by signing or a script – as it was in *Southeastern Promotions* – means that future nude dancing in adult entertainment establishments apparently may receive protection of the warrant requirement if the dancers use words on stage or if they and their manager prepare a script for the performances. *See* App. 11. Substantive First and Fourth Amendment protections should not depend on such formalistic distinctions.

Thus, if police officers must obtain a warrant before seizing an object that is allegedly obscene, they must also obtain a warrant before seizing a person on the same basis.

II. THIS COURT SHOULD DECIDE WHETHER POLICE OFFICERS MAY ARREST INDIVIDUALS FOR VIOLATING ANTI-OBSCENITY STATUTES WITHOUT FIRST ACTUALLY CONCLUDING THAT THE EXPRESSION AT ISSUE IS, IN FACT, OBSCENE.

In *Whren v. United States*, 517 U.S. 806 (1996), this Court reaffirmed the rule enunciated in *Scott v. United States*, 436 U.S. 128 (1978), that police officers' "[s]ubjective intentions play no role in *ordinary*, probable-cause Fourth Amendment analysis." *Id.* at 813 (emphasis added). An arrest, this Court explained, ordinarily satisfies Fourth Amendment strictures "so long as the circumstances" that were known to the officer at the time, "viewed objectively," support a *post hoc* determination of probable cause. *Id.* at 813 (quoting *Scott*, 436 U.S. at 136). Thus, it ordinarily is immaterial whether arresting officers pay any attention at all to statutory elements of crimes or whether they actually conclude before arresting an individual that probable cause exists to believe that that individual has violated *any* law. *See Scott*, 436 U.S. at 138 ("We have . . . held that the fact that the officer does not have the state of mind hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.") (citing *United States v. Robinson*, 414 U.S. 218 (1973)).

This Court, however, has never addressed whether this purely objective, *post hoc* probable-cause rule applies to arrests of individuals involved in expression that is presumptively protected by the First Amendment. In this case, the Washington Supreme Court held that it did. It held that *Whren*'s and *Scott*'s "ordinary, probable-cause

Fourth Amendment analysis" applies to arrests for sexually explicit expression – that is, to arrests for activity that arguably is protected by the First Amendment. Pet. App. 19-20. The Washington Supreme Court thus concluded that the fact that the police officers here failed to consider whether the dancers' performances were obscene before arresting them and their promoter was "not necessarily fatal" to the City's claim that its officers had probable cause to make those arrests. Pet. App. 19. This Court should review this ruling and – in the event that it decides that police officers need not obtain pre-arrest warrants in such situations – hold that the general rule that arrests are valid so long as a post-arrest, objective appraisal of the facts establishes probable cause does not apply in the special circumstance when, as here, arrests pose a risk of operating as a prior restraint on free expression. When arrests pose such a risk, the First and Fourth Amendments require, at a bare minimum, that police officers actually conclude that the expression at issue is obscene *before* arresting any individuals.

This Court consistently has held in contexts similar to this one that the ordinary rules governing probable cause do not apply when First Amendment interests are implicated. In summarizing the *Marcus/Roaden* line of cases, this Court explained that "while the *general rule* under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause . . . , it is otherwise when materials presumptively protected by the First Amendment are involved." *Fort Wayne Books*, 489 U.S. at 63 (emphasis added). Police officers may not seize materials presumptively protected by the First Amendment until a judicial officer actually has determined that they are obscene. *Roaden*, 413 U.S. at 504-06; *Marcus*, 367 U.S. at 731-33; *see also Alexander v. United States*, 509 U.S. 544, 577 (1993) (Kennedy, J., dissenting) ("we have been careful to say that First Amendment materials cannot be taken out of circulation *until they have been determined to be unlawful*") (emphasis added). The reason for the special treatment of

expressive materials is that any pre-adjudication seizure of constitutionally protected expression constitutes a prior restraint. *See Macon,* 472 U.S. at 470.

These same considerations require, at the very least, that police officers themselves actually determine that they are witnessing obscene expression before arresting any individual promoter or live performer pursuant to an anti-obscenity ordinance. Nude dancing is presumptively protected expression, and an arrest of a person engaged in protected expression undoubtedly constitutes a prior restraint. *See, e.g., Southeastern Promotions,* 420 U.S. at 554-57. And "the settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' " *Id.* at 559 (quoting *Freedman v. Maryland,* 380 U.S. 51, 58 (1965)).

The Washington Supreme Court's rule that police officers need not even consider whether they are witnessing obscene conduct before arresting performers or promoters pursuant to an adult entertainment regulation lacks a single "procedural safeguard[ ] designed to obviate the dangers of a censorship system." *Southeastern Promotions,* 420 U.S. at 559. A judicial determination after an arrest has taken place that the conduct at issue constituted protected expression comes far too late to cure any harm resulting from censoring the individual's message. Indeed, even the other decisions that have held that police officers need not obtain warrants before making arrests under anti-obscenity statutes have expressly assumed that the officers themselves would make obscenity determinations before undertaking any such arrests. *See Hanson,* 435 N.E.2d at 123 (officers arrested performers based on reasonable belief that performance was obscene); *Morgan,* 86 Misc. 2d at 378, 382-83 (officers will come "to the reasonable belief that an obscene act is occurring in his presence" before making arrest).

The Washington Supreme Court's refusal to require at least police officers to make obscenity determinations

before arresting individuals not only imposes an unacceptable prior restraint, but also threatens to have a substantial chilling effect that dissuades individuals from even attempting to exercise their First Amendment rights. If the only protection that dancers, entertainers, and promoters have against unconstitutional arrests for engaging in sexually explicit, non-obscene expression is a post-arrest successful motion in criminal court proceedings (and a subsequent civil rights action in which they will be saddled with the burden of proving that there was no probable cause to believe that their performances were obscene), then many such individuals will simply refrain from exercising their First Amendment rights.

If this Court declines to hold that a judicial determination of obscenity must precede any arrest of a live performer or promoter, it should at least hold that the First Amendment interest in preventing prior restraints requires police officers themselves to make such determinations prior to making any such arrests.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR CONSIDERING THE TWO QUESTIONS PRESENTED.

In considering whether this case is a suitable vehicle for considering the Questions Presented, this Court should bear two issues in mind: (a) whether the facts of this case squarely and cleanly present the questions presented; and (b) whether this Court has jurisdiction over the rulings of the Washington Supreme Court regarding these questions. Each of these considerations counsels toward granting review here.

A. The Facts of this Case Squarely and Cleanly Present the Questions Presented.

There is no dispute regarding the facts underlying the two Questions Presented in this conditional cross-petition. First, it is undisputed that the police officers made the arrests at issue pursuant to an anti-obscenity

statute and that they did so without any warrants or prior judicial determinations of obscenity. Pet. App. 3. Second, it is undisputed that none of the police officers themselves considered whether the performances at issue were obscene before they arrested the dancers and promoters. Pet. App. 19. This case, in fact, is an especially ideal vehicle for considering the two Questions Presented because the police here arrested both live performers and their individual promoter. To the extent that this Court might be inclined to think that different legal rules should apply to these two different types of individuals, this case allows this Court to consider both situations in the same case.

This case also highlights the prior restraint problem that is inherent in arrests of live entertainers. When the police arrested the dancers and the promoter, the officers also asked the nightclub's customers to leave the premises. The promoter had to close the nightclub for over one hour. Yet none of the dancers (nor the promoter) was ever convicted of obscene conduct or any other crime. The City tried one of the dancers in municipal court, but the jury acquitted her. Pet. App. 29. The City dismissed the charges against all of the other arrested individuals. Pet. App. 29.[7] Hence, the City's arrests pretermitted several presumably constitutionally protected exhibitions without any justification for doing so.

Lastly, the fact that the issues in this lawsuit are raised under 42 U.S.C. § 1983, rather than in response to a criminal prosecution, makes it clear that there are no alternate federal grounds for decision. In a criminal case, this Court may decline to reach the constitutionality of an

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[7] The City's preamble to its questions presented is thus seriously misleading. The City states that "Seattle police officers arrested adult entertainers after observing *violations* of the standards of conduct set forth in Seattle's adult entertainment ordinance." Pet. i (emphasis added). In fact, a jury found one entertainer *not guilty* of violating that ordinance, and the City elected not to prosecute the rest of the entertainers. App. 29.

arrest if the defendant is acquitted or if this Court concludes that other evidence untainted by the arrest supports the defendant's convictions. But here, the Cross-Petitioners seek declaratory and injunctive relief as well as damages under 42 U.S.C. § 1983 regarding the legality of their arrests and the City's custom of arresting individuals for violations of SMC 6.270.100 without obtaining constitutionally sufficient warrants (or even requiring officers themselves to make pre-arrest determinations of obscenity). These claims squarely present the First and Fourth Amendment Questions Presented in this conditional cross-petition.

B. This Court Possesses Jurisdiction Over the Washington Supreme Court's Rulings Involved in this Conditional Cross-Petition.

The Washington State courts have not yet issued final judgments regarding all of the issues involved in this lawsuit. Although this actuality, in our view, deprives this Court of jurisdiction over the City's petition for certiorari, *see* Respondents' Br. in Opp. at 15-20, it does not necessarily deprive this Court of jurisdiction over the Questions Presented in this conditional cross-petition. The questions involved in this cross-petition satisfy an exception to the final judgment rule because – unlike the questions that the City presents – they concern important First Amendment rights that would be *undermined* or *underprotected* if this Court foregoes review of them.

This Court held in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that it may exercise jurisdiction over state court judgments that have not terminated state court proceedings when:

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the

> state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court [may] entertain[ ] and decide[ ] the federal issue.

Id. at 482-83.

This Court repeatedly has invoked this rule to assume jurisdiction in cases where states' highest courts have finally decided a First Amendment issue in a manner that erodes or underprotects the right to free expression. *Fort Wayne Books,* 489 U.S. at 56-57 ("where an important First Amendment claim *is* before us" the federal policy at issue is significant enough to invoke the *Cox* exception); *see also Cox,* 420 U.S. at 485-87 (state court ruling that First Amendment did not protect media's right to produce certain information); *National Socialist Party v. Skokie,* 432 U.S. 43, 44 (1978) (per curiam) (state court ruling that First Amendment did not protect an organization's march); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247 n.6 (1974) (state court ruling that First Amendment did not protect newspaper's actions). Indeed, in *Fort Wayne Books* this Court has applied this *Cox* exception to assume jurisdiction over an interlocutory state court decision involving essentially the same kind of issue as is presented here – namely, a state court decision holding that the *Marcus/Roaden* warrant requirement did not apply to seizures of books and films pursuant to a state RICO statute. *Fort Wayne Books,* 489 U.S. at 54-57.

This precedent dictates that this Court has jurisdiction over this cross-petition. The Washington Supreme Court finally has determined that the First and Fourth Amendments do not require police officers to obtain constitutionally sufficient warrants or even themselves to

consider the issue of obscenity before making arrests pursuant to anti-obscenity ordinances. Pet. App. 11-12, 19-20. The questions presented here, as in *Fort Wayne Books*, thus "call into question the legitimacy of the law enforcement practices of several States" under the "limits [of] the First Amendment." *Fort Wayne Books*, 489 U.S. at 56; *see also supra* at section I.A (discussing other States' decisions upholding police arrest policies similar to the one at issue here). Furthermore, as in *Cox*, "if [this Court] now holds that the First and Fourteenth Amendments," as well as the Fourth Amendment, forbids such arrests, "this litigation ends" with respect to the legality of the City's arrests. 420 U.S. at 486.

Despite the presence of this Court's jurisdiction over the warrant and *post hoc* determination issues in this case's current procedural posture, Cross-Petitioners elected not to initiate certiorari proceedings at this stage of affairs. After issuing its initial decision in this case, the Washington Supreme Court entered an order changing its opinion to clarify that the Washington Court of Appeals should consider on remand "the availability of injunctive or declaratory relief under the state constitution" on the ground that Wash. Const. Art. I, § 5 requires police officers to obtain a warrant before arresting individuals for violations of SMC 6.270.100. Pet. App. 47. (Briefing on that remand is currently underway and is scheduled to be completed in late May of 2002. Opp. App. 25-27.) The Washington Supreme Court also has recalled its mandate regarding this case, further indicating that it views its instant decision as interlocutory in nature. Opp. App. 24; Wash. R. App. Proc. 12.5(a).[8] Therefore, in the current remand or in further proceedings in the Washington Supreme Court, Cross-Petitioners may still obtain an

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[8] Wash. R. App. Proc. 12.5(a) provides in pertinent part that "[a] 'mandate' is the written notification by the clerk of the appellate court to the trial court and to the parties of an appellate court decision terminating review. No mandate issues for an interlocutory decision of the appellate court."

injunction and declaratory judgment (but not damages) on state law grounds that mirrors the ones they seek on First and Fourth Amendment grounds.

Cross-Petitioners are content to let these remand proceedings in the Washington Court of Appeals play their way out before considering invoking the jurisdiction of this Court. But if this Court decides that it is preferable for it to intervene in this litigation now, they urge this Court to review the issues presented here in addition to those presented in the City's petition for certiorari.

CONCLUSION

For the foregoing reasons, if this Court grants the City's petition for a writ of certiorari in this case, it also should grant Cross-Petitioners' conditional cross-petition for a writ of certiorari.

RESPECTFULLY SUBMITTED this 10th day of April, 2002.

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IN THE SUPREME COURT
OF THE UNITED STATES

NICK FURFARO; BRANDY KIDDER;
ESMERALDA SILVA; and JJR, INC.,

Conditional Cross-Petitioners,

v.

CITY OF SEATTLE,

Conditional Cross-Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the State Of Washington

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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23

Table of Contents

Page

OPPOSITION TO FURFARO'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 2

A. Factual Background 2

1. Seattle police officers arrested the individual plaintiffs for conduct 2

2. The City obtained partial summary judgment prior to trial 3

3. The jury found that officers had probable cause to arrest for criminal conduct 4

B. The Court of Appeals Imposed a Warrant Requirement and Remanded Plaintiffs' Wrongful Arrest Claims for Trial on Damages 6

C. The Washington Supreme Court Properly Rejected the Warrant Requirement 6

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION FOR A WRIT 8

A. The Washington Supreme Court's decision to reject Furfaro's warrant argument does not contradict prior decisions of this Court 9

1. No conflict under Rule 10(b) 9

2. No conflict under Rule 10(c) 10

3. No conflict with *Southeastern Promotions* 12

4. No conflict with *Marcus* and *Roaden* 13

B. Furfaro cannot raise a new argument regarding pre-arrest subjective determinations of obscenity by an arresting officer 19

CONCLUSION 20

Table of Authorities

Page

Cases

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) 11

California v. LaRue, 409 U.S. 109 (1972) 14, 15

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 7, 11, 13

Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996) 19

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 11, 13, 14, 16, 17, 18

Law Offices of Stein v. Cadle Co., 250 F.3d 716 (9th Cir.), *cert. denied*, __ U.S. __, 122 S.Ct. 215 (2001) 19

Penthouse Int'l, Ltd. V. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 10

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) 12

Schmidt v. Cornerstone Investments, 115 Wn.2d 148, 795 P.2d 1143 (1990) 19

Speiser v. Randall, 357 U.S. 513 13

State v. Furuyama, 637 P.2d 1095 (Haw. 1981) 10

State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981) 19

United States v. O'Brien, 391 U.S. 367 (1968) 16, 17

Statutes

42 U.S.C. § 1983 3

SMC 6.27.100 2

SMC 6.270.100(A)(2) 1

OPPOSITION TO FURFARO'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Conditional Cross-Respondent City of Seattle hereby opposes the conditional cross-petition for a writ of certiorari in this case by Furfaro.[1] Seattle's adult entertainment ordinance regulates conduct, such as simulated masturbation and self-massage, as well as obscene expression. Furfaro's cross-petition attempts to characterize Seattle's adult entertainment ordinance as "the same kind of statutes" addressed in this Court's prior decisions dealing with books and films: i.e., "an anti-obscenity statute." Cross-Pet. at i. In fact, Seattle's ordinance regulates both acts and simulated acts, but does not attempt to regulate books or films. SMC 6.270.100(A)(2); Cross-Pet. at 2. There is no dispute that the arrests in this case were based upon actions, rather than the content of printed materials or films.

Regarding Furfaro's first question presented, the City concedes that the question of whether a warrant should be required in order to make arrests under Seattle's ordinance presents a significant question of federal law. However, this Court has *already* determined that nude dancing is not afforded the same First Amendment protections as books and films, and the Washington Supreme Court's rejection of the warrant requirement is not in conflict with this Court's decisions.

Furfaro's second question presented was not preserved on appeal and is not properly presented to this Court. The City opposes consideration of whether

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[1] Hereinafter, collectively, Kidder, Silva, Furfaro and JJR, Inc.

officers should be required to subjectively determine obscenity as part of a probable cause determination *prior* to making arrests under Seattle's ordinance.

STATEMENT OF THE CASE

A. Factual Background.

1. Seattle police officers arrested the individual plaintiffs for conduct.

Undercover Seattle Police detectives entered Rick's nightclub on November 20, 1995, to look for conduct violations of Seattle's adult entertainment ordinance, SMC 6.27.100. One detective made a tape recording of observed conduct violations, and he verbally described the actions of entertainers on the main stage. Pet. App.[2] at 3 (144 Wn.2d at 366-67).

The taped observations included the detective's observations of "Gabrielle," the stage name used by Brandy Kidder. Pet. App. at 68-70. The tape also included observations of "Essie," whom Swanson later learned was Esmeralda Silva. Pet. App. at 70. The detective recorded the following observations for Kidder and Silva:

> Gabrielle on the main stage black sparkling string bikini. She touched her anus, buttocks, massaged her breasts. Gabrielle has long brown hair, slightly on the heavy side.

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[2] Appendix to the City's Petition for Writ of Certiorari in No. 01-1316, the companion to the instant cross-petition.

* * *

> Jessie on the main stage. A Hispanic female, long black hair wearing a black lace bra and a matching black lace t-bar and white stiletto heels. Jessie is massaging her breasts and massaging her vagina. Again massaging her breasts, pinching her nipples; she just massaged her vagina, again massaging her breasts, pinching her nipples. She again massaged her vagina.
>
> * * *
>
> I think we've come around full circle. Gabrielle is back up on stage. She just touched her vagina again, rubbing her breasts, and (unintelligible).

Pet. App. at 84-85, 87.

Based on the recorded observations, officers arrested 13 dancers, including Silva and Kidder, as well as their manager, plaintiff Nick Furfaro. Pet. App. at 3 (144 Wn.2d at 367). Silva, Kidder and Furfaro subsequently challenged their arrests under 42 U.S.C. § 1983, alleging a violation of the First, Fourth, and Fourteenth Amendments, as well as additional claims. Pet. App. at 3-4 (*Id.*).

2. The City obtained partial summary judgment prior to trial.

At summary judgment, the trial court dismissed all state tort claims, and dismissed on qualified immunity grounds all 42 U.S.C. § 1983 claims against individual defendants. However, the trial court

preserved § 1983 claims against the City for trial. Pet. App. at 3-4 (144 Wn.2d at 367).

3. The jury found that officers had probable cause to arrest for criminal conduct.

At trial, Brandy Kidder denied committing the criminal acts reported by the detective, and testified that she did not masturbate during her stage appearance. Pet. App. at 57-58. Kidder testified that her hands didn't remain in any one area (Pet. App. at 56), and that she "didn't do any dirty dances that day." Pet. App. at 59. Finally, she testified that she never thought any of her actions could be considered masturbation or simulated masturbation. Pet. App. at 61-62.

Esmeralda Silva likewise denied committing the acts observed by the detective, and testified that she never massaged her vagina or rubbed her vaginal area during her stage appearances on November 20. Pet. App. at 65. Instead, she testified that she merely covered herself with her hands. *Id.* Neither Kidder nor Silva admitted at trial to massaging breasts or rubbing vaginas in the manner described by Detective Swanson, nor did either testify that she intended to convey any message by massaging her breasts or rubbing her vagina on November 20.

At trial, officers testified that they had observed conduct violating the ordinance's prohibition on touching, caressing, or fondling of the breasts, buttocks, or genitals. Detective Swanson confirmed that he had observed the violations by Kidder and Silva as

recorded on the tape. Pet. App. at 82-83. None of the touches were momentary or fleeting touches. *Id.* According to the detective, "massaging a breast" means grabbing the breast and squeezing, manipulating it with the hand. Pet. App. at 75. "Massaging the vagina" means actual touching of the vaginal area with the hand and fingers for two to three seconds. Pet. App. at 78-79. Detective Swanson did not record incidental contact or incidental touching as a violation. Pet. App. at 80-81.

Kidder and Silva played a videotape to the jury purporting to show the type of dances performed by Kidder and Silva. However, the detective testified that the videotape omitted the specific conduct violations that he had observed during the performances by Kidder and Silva. Pet. App. at 20-21 (144 Wn.2d at 380).

During its deliberations, the jury was instructed by the trial court as follows: "In determining probable cause, an arresting officer making an arrest for expression, must consider obscenity. In determining probable cause, an arresting officer making an arrest for conduct, need not consider obscenity." Pet. App. at 22-23 (*Id.* at 382-383). There was absolutely no evidence at trial that any officer considered obscenity or made an arrest for expression. Pet. App. at 19 (*Id.* at 378). Instead, the officers testified that they observed and arrested for conduct violations of Seattle's ordinance. Pet. App. at 17 (*Id.* at 377-378). The jury found that the arresting officers had probable cause to arrest Furfaro, Kidder, and Silva. Pet. App. at 29 (97 Wn.App. at 540).

B. The Court of Appeals Imposed a Warrant Requirement and Remanded Plaintiffs' Wrongful Arrest Claims for Trial on Damages.

Furfaro appealed, contending that warrants were required as a matter of law prior to the arrests in this case. Furfaro did not assert any claim or assign error regarding the timing of the arresting officer's probable cause determination.

The Washington Court of Appeals found that the activities described by the arresting officers were "nude dance performances" (Pet. App. at 28 (*Id.* at 539)), and therefore "presumptively protected by the First Amendment." Pet. App. at 33 (*Id.* at 543). The Court of Appeals ruled that a warrant was required prior to making arrests under Seattle's ordinance, and remanded the case for additional proceedings. Pet. App. at 43 (*Id.* at 551). The opinion contains no mention of any contention by Furfaro that, in the absence of a warrant requirement, arresting officers should be compelled to *subjectively* engage in an evaluation of obscenity *prior* to the arrests in this case, nor was the remand for trial to include such a requirement.

C. The Washington Supreme Court Properly Rejected the Warrant Requirement.

The Washington Supreme Court reversed the Court of Appeals' requirement that officers obtain a warrant from a magistrate prior to effecting arrests under Seattle's adult entertainment ordinance. Pet. App. at 25 (144 Wn.2d at 384). As the court noted, "the

Supreme Court precedents cited by Respondents do not support the claim that the First Amendment affords nude dancing the same level of protection given to books and film." Pet. App. at 11 (144 Wn.2d at 374). The court continued as follows:

> On the contrary, the United States Supreme Court's reiterated opinion is that nude dancing only receives *minimal protection* under the First Amendment. That level of protection is insufficient to support the Court of Appeals' contention that a warrant is required by the First and Fourth Amendments *even though no federal or Washington court had recognized such a requirement.*

Pet. App. at 12 (*Id.*) (emphasis supplied).

The Washington Supreme Court did go on to hold that all acts by adult entertainers are expressive conduct, interpreting *City of Erie v. Pap's A.M.* as having "stated clearly, for perhaps the first time, that nude dancing is expressive conduct." Pet. App. at 17 (144 Wn.2d at 278). The Washington Supreme Court then found that probable cause for the arrest of such entertainers must include a determination of obscenity. Pet. App. at 21-22 (*Id.* at 381-382). As a result, the case was remanded for trial on the question of whether the arresting officers had probable cause to believe that the observed acts were obscene. Pet. App. at 23 (*Id.* at 383).

The opinion contains no mention of any contention by Furfaro that, in the absence of a warrant

requirement, arresting officers should be compelled to *subjectively* engage in an evaluation of obscenity prior to the arrests in this case. The opinion remands for a new trial on the federal claims, and notes that the trial will not include claims of an unreasonable arrest procedure. Pet. App. at 24 (144 Wn.2d at 384). Notably, there is no directive that the jury instructions on probable cause be modified to require officers to subjectively evaluate obscenity prior to making arrests.

Furfaro moved for reconsideration, seeking to preserve state claims for injunctive relief. Furfaro did not seek clarification regarding the timing of the arresting officer's probable cause determination. The Washington Supreme Court granted reconsideration in part by order dated December 5, 2001. Pet. App. at 46-48.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION FOR A WRIT

Furfaro contends that its questions presented in its Cross-Petition are "inextricably intertwined" with the issues presented in the City's petition. Cross-Pet. at 10. However, Furfaro fails to demonstrate that its issues satisfy Supreme Court Rule 10, and the City opposes review of Furfaro's issues.

Regarding the warrant requirement, Furfaro has made no showing of any conflict with any decision from this Court. This Court has already refused to grant nude dancing automatic entitlement to the full First Amendment protections reserved for books and films. The court's decision below simply recognizes

this Court's reiterated distinction between nude dancing and pure expression. Furfaro cannot attain review on this issue.

Furfaro's second question presented is entirely new to the case. Furfaro's new contention was never assigned as error, briefed, or argued to the underlying courts during either the trial or Furfaro's appeal therefrom. Any alleged error in the probable cause instruction has not been preserved on appeal. The cross-petition should be denied.

A. The Washington Supreme Court's decision to reject Furfaro's warrant argument does not contradict prior decisions of this Court.

A petition for a writ of certiorari will be granted only for compelling reasons, as set forth in Supreme Court Rule 10. Furfaro fails to demonstrate that the Washington Supreme Court's decision reversing the warrant requirement satisfies the requirements of Rule 10, and the cross-petition should be denied.

1. No conflict under Rule 10(b).

Furfaro argues that "state and federal courts are divided regarding whether police officers must obtain warrants before arresting live entertainers or promoters for violations of an anti-obscenity ordinance." Cross-Pet. at 13. Furfaro's arrest cases involving *promoters* of obscene *materials* fail to establish grounds for this Court to accept review of the live entertainment arrest issues presented by Furfaro in this case, as explained more fully below. Seattle's adult entertainment ordinance

cannot fairly be characterized as merely an anti-obscenity ordinance, as it regulates conduct as well as obscene expression. Furfaro cannot obtain review by portraying the arrests in this case as arrests for promoting obscene materials.

Furfaro apparently seeks review under Rule 10(b), which requires that the underlying decision be in conflict with the decision of either another state court of last resort or of a United States court of appeals. Of the cases cited at pages 13 through 15 of the Cross-Petition, only two cases have the level of review specified under 10(b): *Penthouse Int'l, Ltd. V. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980), and *State v. Furuyama*, 637 P.2d 1095 (Haw. 1981). However, as admitted by Furfaro, both of these cases involved an arrest for selling allegedly-obscene printed materials. Cross-Pet. at 14. There was no arrest in this case for selling or promoting any allegedly-obscene printed materials or films, and Furfaro fails to show a relevant conflict under Rule 10(b).

2. No conflict under Rule 10(c).

Furfaro argues that "This Court has held that live entertainment is entitled to the same level of First Amendment protection against prior restraints as are books and films." Cross-Pet. at 12. Of course, in this case, the arrests were indisputably made *after* the arresting officer observed the prohibited conduct. In reality, Furfaro seeks to have all arrests under Seattle's adult entertainment ordinance treated in exactly the same fashion as all seizures of allegedly-obscene printed materials or films: requiring a warrant issued in

advance by a magistrate. *Id.* However, Furfaro can identify no decision of this Court imposing such a requirement,[3] and review of this issue is not warranted under Rule 10(c).

The Washington Supreme Court correctly determined that nude dancers at arrest are not automatically entitled to the same constitutional protections afforded to allegedly-obscene printed materials or films. As set forth by this Court's opinion in *City of Erie v. Pap's A.M.*,[4] "so long as the regulation is unrelated to the suppression of expression, *'the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.'*" 120 S.Ct. at 1396 (2000) (emphasis supplied, additional citations omitted). This simple proposition is fatal to Furfaro's claimed entitlement to the protections of a warrant in this case.

The court below noted that *Pap's A.M.* considered nude dancing to fall "only within the outer ambit of the First Amendment's protection." Pet. App. at 8 (citing *Pap's A.M.*, 529 at 284). The court correctly rejected Furfaro's contention that *Roaden*,[5] *Doran*[6] and *Barnes*[7] would require a warrant for the arrests in this case. Pet. App. at 6-8 (144 Wn.2d at 369-371). In fact, the court emphasized *Doran's* comment that barroom nude dancing may involve "only the *barest minimum of*

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[3] Furfaro was similarly unable to make such a showing to the court below, which found that no federal or Washington court had imposed such a requirement. Pet. App. at 12.

[4] *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

[5] *Roaden v. Kentucky*, 413 U.S. 496 (1973).

[6] *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

[7] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

protected expression." Pet. App. at 7 (*Id.* at 370). Furfaro can hardly contend that its requested warrant would afford it only minimum protection. *See,* Pet. App. at 7, fn. 2 (acknowledging that the barest forms of expression deserve the barest protections).

3. No conflict with *Southeastern Promotions*.

In reliance upon *Southeastern Promotions,*[8] Furfaro argued to the court below that because "live drama receives the same level of First Amendment protection as other forms of expression, live entertainers are entitled to be free from warrantless arrests." Pet. App. at 10 (144 Wn.2d at 373). The Washington Supreme Court declined to equate all of the nude dancing in this case with the theatrical performances at issue in *Southeastern Promotions,* instead finding it akin to the nude dancing *subset* of live entertainment discussed in *Schad.*[9] Pet. App. at 10-11 (*Id.* at 373-374).

Furfaro now contends that the court below erred in refusing to protect "live entertainment with exclusively nonverbal elements." Cross-Pet. at 16. In light of the *minimal* First Amendment protections reiterated by subsequent decisions of this Court, the Washington Supreme Court properly found no support in *Southeastern Promotions* for Furfaro's "claim that the First Amendment affords nude dancing the same level of protection given to books and film." Pet. App. at 11 (*Id.* at 374). The court's holding is not in conflict with this Court's earlier ruling that a theater's refusal to

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[8] *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975).

[9] *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981).

permit a scheduled performance of the musical "Hair" was a prior restraint.

4. No conflict with *Marcus*[10] and *Roaden*.

Furfaro argues that "there is nothing in this Court's *Marcus/Roaden* line of cases suggesting that the warrant requirement that applies to books and films should not apply to live performers and promoters." Cross-Pet. at 17. Of course, such a statement depends upon which cases are included in the "line." Other cases from this Court clearly differentiate the level of protections afforded to nude dancing, as opposed to books and films. For instance, as set forth above, *supra*, *Pap's A.M.* considered nude dancing to fall only within the "outer ambit" of the First Amendment, while *Doran* allowed that nude dancing may involve only the "barest minimum" of protected expression.

In *Marcus*, this Court addressed "whether the use by Missouri in this case of the search and seizure power to suppress *obscene publications* involved abuses inimical to protected expression." 367 U.S. at 729-730 (emphasis supplied). This Court noted as follows:

> "... The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. ... *The separation of legitimate from illegitimate speech* calls for ... sensitive tools ...." *Speiser v. Randall*, 357 U.S. 513, 525 n.24. It follows that, under the

[10] *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

> Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.

Id. at 731 (emphasis supplied). Thus, *Marcus* dealt with the distinction between legitimate versus illegitimate speech, rather than the distinction between conduct and expression. *Marcus* did not extend presumptive First Amendment protections to all conduct that occurs on stage, nor is it in conflict with the Washington Supreme Court's decision to reverse the warrant requirement.

This Court in *Doran* analyzed a preliminary injunction that prohibited enforcement of a local ordinance. The ordinance made it unlawful "to permit waitresses, barmaids, and entertainers to appear in their establishments with breasts uncovered or so-thinly-draped as to appear uncovered." 422 U.S. at 924. In assessing the likelihood of success on the merits, this Court held:

> Although the customary "barroom" type of nude dancing may involve only the *barest minimum* of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under *some circumstances*. In *LaRue*, however, we concluded that the broad powers of the

States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as a part of its liquor license program. In the present case, the challenged ordinance applies not merely to places which serve liquor, but to many other establishments as well. The District Court observed, we believe correctly:

> The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in "any public place" with uncovered breasts. There is no limit to the interpretation of the term "any public place." It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the "Ballet Africains" and a number of other works of unquestionable artistic and socially redeeming significance. 364 F. Supp., at 483.
>
> * * *

Even if we may assume that the State of New York has delegated its authority under the Twenty-first Amendment to towns such as North Hempstead, and that the ordinance would therefore be constitutionally valid under *LaRue, supra,* if

> limited to places dispensing alcoholic beverages, the ordinance in this case is not so limited. Nor does petitioner raise any other legitimate state interest that would counterbalance the constitutional protection presumptively afforded to activities which are plainly within the reach of Local Law 1-1973. *See United States v. O'Brien,* 391 U.S. 367, 377 (1968). In these circumstances, and in the light of existing case law, we cannot conclude that the District Court abused its discretion by granting preliminary injunctive relief.

Id. at 932-934 (emphasis supplied).

The works afforded presumptive constitutional protection under *Doran's* analysis are the "works of unquestionable artistic and socially redeeming significance," such as the Ballet Africains. *Doran's* overbreadth analysis does not render all live acts to be expression, nor does it extend presumptive protection to any and all displays of the uncovered female breast, let alone the acts of the plaintiffs reported by the arresting officers in this case.

The *Doran* opinion cites to *O'Brien,* where this Court rejected presumed protections for conduct:

> O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argu-

> ment is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft." We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. *However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.*

United States v. O'Brien, 391 U.S. 367 (1968) (emphasis supplied).

Thus, the *O'Brien* opinion refused to presume that all communicative conduct is entitled to constitutional protection. Instead, *O'Brien* maintained the distinction between conduct and speech, as well as the distinction in constitutional protections that are presumptively afforded to each. Under *O'Brien*, this Court would not require a warrant prior to arresting a protester for destroying his registration certificate. Neither *O'Brien* nor *Doran* conflicts with the Washington Supreme Court's decision to reverse the warrant requirement in this case.

This Court in *Roaden* discussed the scope of presumptive protection afforded to expression:

> ... prior restraint of the right of expression, whether by *books or films*, calls for a higher hurdle in the evaluation of reasonableness. The *setting of the bookstore or the commercial theater*, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.

Roaden, 413 U.S. at 504 (footnote omitted; emphasis supplied). Thus, this Court in *Roaden* did not extend presumptive protections beyond books and films. In conjunction with *Doran*, *Roaden* would support extending protections to printed materials, films, and performances of the Ballet Africains and other works of "*unquestionable* artistic and socially redeeming significance." Given this Court's subsequent comments, all nude dancing is not presumed to have unquestionable artistic and socially redeeming significance. Neither *Roaden* nor *Doran* extends presumptive protections or a pre-arrest requirement of a warrant to the conduct reported by the arresting officers in this case.

In sum, the Washington Supreme Court gave full effect to prior statements of this Court that nude dancing is on the "fringe" of First Amendment expression, allowing states to regulate such activity more freely than expression in books or films.

Furfaro's argument in support of a warrant would ignore this Court's distinction between nude dancing and pure expression. The Washington Supreme Court is not in conflict with this Court in refusing to require a warrant for the arrests in this case.

B. Furfaro cannot raise a new argument regarding pre-arrest subjective determinations of obscenity by an arresting officer.

Under the Washington law governing Furfaro's appeal from the trial court's disposition of this case, issues that are not argued on appeal are considered abandoned. *State v. Williams*, 96 Wn.2d 215, 226, 634 P.2d 868 (1981). Without cogent argument and briefing, the court should not consider an issue on appeal. *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990).

Furfaro never assigned any error to the trial court's instructions on probable cause. Furfaro has never argued to any Washington appellate court that an officer should be required to subjectively assess obscenity prior to making a lawful arrest in this case. Furfaro cannot raise these new issues on appeal. *See, Law Offices of Stein v. Cadle Co.*, 250 F.3d 716, 718 n. 3 (9th Cir.), *cert. denied*, __ U.S. __, 122 S.Ct. 215 (2001) ("we decline to allow [the government] to raise the issue for the first time on appeal."); *Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996) ("The district court is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal.").

CONCLUSION

For the reasons set forth above, the City opposes the conditional cross-petition by Furfaro in this matter. The City respectfully requests that the cross-petition be denied in its entirety.

Respectfully submitted.

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No. 01-1522

In The
Supreme Court of the United States

NICK FURFARO; BRANDY KIDDER;
ESMERALDA SILVA; and JJR, INC.,

Conditional Cross-Petitioners,

v.

CITY OF SEATTLE,

Conditional Cross-Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Washington

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ARGUMENT	2
	A. The Washington Supreme Court's Refusal to Require a Warrant Here is Inconsistent with this Court's Precedent	2
	B. Cross-Petitioners' Second Question Presented is Properly Before this Court	5
III.	CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Bantam Books v. Sullivan, 372 U.S. 58 (1963) 3

Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182 (1945) 6

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 1, 3

Dima Corp. v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999) 4

Jenkins v. Georgia, 418 U.S. 153 (1974) 6

Marcus v. Search Warrant, 367 U.S. 717 (1961) 2, 4, 5

Miller v. California, 413 U.S. 15 (1973) 3

Orr v. Orr, 440 U.S. 268 (1979) 6

Payton v. New York, 445 U.S. 573 (1980) 5

Raley v. Ohio, 360 U.S. 423 (1959) 6

Roaden v. Kentucky, 413 U.S. 496 (1973) 2, 4, 5

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 4

Steagald v. United States, 451 U.S. 204 (1981) 5

Whitney v. California, 274 U.S. 357 (1927) 6

OTHER AUTHORITY

Stern & Gressman et al., Supreme Court Practice (7th ed. 1993) 6

I. INTRODUCTION

The City's briefing to this Court makes it plain that it believes that its police officers have the right – without obtaining a warrant or even considering the issue of obscenity – to arrest any performer in an adult entertainment establishment who touches her buttocks, breast or other private area while dancing on stage. Br. in Opp. at 1-3, 16. This radical proposition is at loggerheads with this Court's free expression jurisprudence, and finds no support in this Court's prior restraint or Fourth Amendment cases. While nude dancing may fall only within the "outer ambit of the First Amendment's protection," *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion), it is nonetheless protected. Therefore, under the First Amendment as well as Seattle's own ordinance, police officers may arrest adult entertainers for the content of their dances only if they have probable cause to believe that their performances constitute obscene expression. And no decision from this Court or any other court has ever held that nude dancing that includes some self-touching in the course of conveying a sensual message (as it almost always does) automatically becomes obscene conduct. (Indeed, in prior state court proceedings, the jury decided that one of the entertainers arrested in this very case was not guilty of obscenity. App. to City's Pet. for Cert. at 29.) The City's misunderstanding of this basic point demonstrates not only why this Court should deny the City's petition for certiorari, but it also shows why this Court should review the City's warrantless arrest policy at the first appropriate opportunity.

Cross-Petitioners submit this Reply Brief to refute two points in the City's brief in opposition to the Conditional Cross-Petition. First, the Washington Supreme Court's

holding that the warrant requirement that applies to sexually explicit books and film does not also apply to sexually explicit live entertainment is, contrary to the City's arguments, inconsistent with this Court's precedent. Second, the City is simply wrong in asserting that the question whether the Constitution permits after-the-fact probable cause determinations concerning arrests of live entertainers is not properly before this Court.

II. ARGUMENT

A. The Washington Supreme Court's Refusal to Require a Warrant Here is Inconsistent with this Court's Precedent.

While not disputing that division of authority exists on this question, the City urges this Court to deny certiorari on the ground that the Washington Supreme Court's refusal to require officers to obtain warrants before arresting nude dancers for obscene expression is consistent with this Court's precedent.[1] Specifically, the City contends that its warrantless arrest policy is constitutional because when adult entertainers touch their buttocks or breasts

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[1] The City does claim that two of the cases implicated in this split are inapplicable because they "involved an arrest for selling or promoting allegedly-obscene printed materials or films." Br. in Opp. at 10. But the City does not provide any reason for thinking that promoting allegedly obscene books and films is any different from promoting allegedly obscene live entertainment. Nor does any such reason exist. What makes those cases and this one incrementally different from *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *Roaden v. Kentucky*, 413 U.S. 496 (1973), is that the former cases involve arrests of individuals, while the latter involve seizures of inanimate objects. Thus, all of the cases Cross-Petitioners cite in their Conditional Cross-Petition contribute to the split of authority on this issue.

during a stage performance, they engage in "action" or "conduct" that somehow is not entitled to ordinary First Amendment protections. Br. in Opp. at 1, 5, 14. The City further maintains that any prior restraint concerns raised by this policy dissipate because "nude dancing is not afforded the same First Amendment protections as books and films." Br. in Opp. at 1.

The City's arguments are incorrect and, indeed, emphasize that if this Court grants the City's petition for certiorari, a review of this warrant issue is essential as well. The City's position that its officers' conduct here was justified by the dancers' "conduct" is apparently based on its assumption that nude dancing automatically loses First Amendment protection whenever a performer touches her own buttocks or breast. But no court has ever so held, for such a rule would vitiate this Court's doctrine that expressive conduct, including dancing, is unprotected by the First Amendment only if its content *"taken as a whole"* appeals to the prurient interest and is so patently offensive and otherwise lacking in value that it is obscene. *Miller v. California,* 413 U.S. 15, 23 (1973) (emphasis added); *see also City of Erie v. Pap's A.M.,* 529 U.S. 277, 289 (2000) (plurality opinion). Indeed, if identifying obscenity were as easy as identifying an exposed or touched body part in a performance or a picture, then the First Amendment's procedural protections based on the "dim and uncertain line" that separates obscene from protected expression would make no sense. *See, e.g., Bantam Books v. Sullivan,* 372 U.S. 58, 66 (1963). The City's one-size-fits-all approach to identifying obscenity completely undermines this Court's carefully crafted protection of sexually oriented expression.

Because determining whether *any form* of sexually oriented expression is obscene is a sensitive and multi-faceted task, it is clear that the arrests here were just like the seizures at issue in *Marcus v. Search Warrant,* 367 U.S. 717 (1961), and *Roaden v. Kentucky,* 413 U.S. 496 (1973), in the sense that the police officers seized persons/items based on the unreviewed conclusion that their content was so sexually explicit that they were not protected expression. The only distinction between this case and the *Marcus/Roaden* line of cases is that this case involves live entertainment instead of books and films. The key question thus is whether that distinction makes any constitutional difference regarding the need for a pre-seizure warrant.

The City's assertion, echoing the Washington Supreme Court, that "nude dancing is not afforded the same First Amendment protections as books and films," Br. in Opp. at 1, does not answer this question, for it rests on a false comparison. The proper comparison between this case and the *Marcus/Roaden* line of cases is between live entertainment and books and films – or between nude dancing and books and films (found in adult bookstores and theatres) depicting nudity. Either way, the result is the same. This Court explicitly held in *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557-58 (1975), that live entertainment is entitled to the same prior restraint protections as books and film, and every lower court to consider the issue has held that nude dancing is entitled to the same First Amendment protections as sexually explicit books and film. *See, e.g., Dima Corp. v. Town of Hallie,* 185 F.3d 823, 827 (7th Cir. 1999). Similarly, this Court has consistently held that individuals are entitled to as much Fourth Amendment protection against warrantless arrests

as inanimate objects are warrantless against seizures. *See, e.g., Steagald v. United States,* 451 U.S. 204, 213 (1981); *Payton v. New York,* 445 U.S. 573 (1980). Thus, as the dissent below and numerous other courts have recognized, once a proper comparison is made between the seizures at issue here and those at issue in *Marcus* and *Roaden*, it becomes plain that there is no basis for requiring a warrant in one context but not the other. *See* Cross-Pet. at 13-15 (citing cases).

B. Cross-Petitioners' Second Question Presented is Properly Before this Court.

Instead of commenting on the certworthiness of Cross-Petitioners' second question presented (whether arrests of live entertainers can be validated by purely after-the-fact determinations of probable cause), the City argues only that Cross-Petitioners are precluded from raising this argument because they did not raise it below. The City, however, is incorrect as a matter of fact and, in any event, fundamentally misunderstands this Court's rules regarding waiver.

Cross-Petitioners *did* argue below that probable cause was lacking in this case under the First and Fourth Amendments. As the Washington Supreme Court stated, "the [Washington] Court of Appeals *agreed with Respondents that a consideration of obscenity is essential to the determination of probable cause to arrest* under SMC 6.270.100(A)(2)." App. to City's Pet. for Cert. at 14 (emphasis added); *see also id.* at 22 (confirming that Cross-Petitioners raised same argument in Washington Supreme Court). Furthermore, the notion that police officers themselves must at least actually consider obscenity before

making arrests under SMC 6.270.100 is subsumed within Cross-Petitioners' broader argument that such arrests violate the First and Fourth Amendments unless they are done pursuant to a warrant from a neutral magistrate finding that the expression at issue is obscene.

But even if Cross-Petitioners somehow had failed adequately to brief the particular issue whether – in the event that a court held that a neutral magistrate is not required to make a pre-arrest determination regarding obscenity – a police officer must at least do so, it still would not matter in the slightest. It is a basic rule of this Court that "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio,* 360 U.S. 423, 436-37 (1959). It is enough for this Court's purposes if the state's highest court "reached and decided" the issue. *Jenkins v. Georgia,* 418 U.S. 153, 157 (1974); *accord Orr v. Orr,* 440 U.S. 268, 274-75 (1979); *Charleston Federal Savings & Loan Ass'n v. Alderson,* 324 U.S. 182, 185-86 (1945); *Whitney v. California,* 274 U.S. 357, 360-61 (1927); Stern & Gressman et al., Supreme Court Practice §3.18 (7th ed. 1993) ("Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the [United States] Supreme Court's concern with the proper raising of the federal question in the state courts disappears."). In short, this Court "need not inquire how and when" the federal question "was raised [in state court] when such question appears to have been actually considered and decided by that court." *Alderson,* 324 U.S. at 185-86.

There can be no dispute that the Washington Supreme Court extensively considered and decided this second question presented – namely, whether the First and

Fourth Amendments permit police officers' arrests of nude dancers for allegedly obscene conduct to be validated solely by post-arrest determinations of probable cause. App. to City's Pet. for Cert. at 19-22. The City does not contend otherwise. That being so, that question is properly before this Court.

III. CONCLUSION

For the foregoing reasons, if this Court grants the City's petition for certiorari in this case, it should also grant this Conditional Cross-Petition for Certiorari.

RESPECTFULLY SUBMITTED this 31st day of May, 2002.

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